

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOHN HARPER,

Petitioner,

v.

MAGGIE MILLER-STOUT,

Respondent.

Case No. C05-5423FDB

ORDER ADOPTING
REPORT AND
RECOMMENDATION

The Magistrate Judge's Report and Recommendation conclude that the five issues concerning ineffective assistance of counsel are without merit and that the remaining two issues are unexhausted and procedurally barred. Petitioner has filed objections to the R&R as well as a motion for an evidentiary hearing and discovery. Petitioner reasserts his contentions regarding ineffective assistance of counsel and seeks discovery and an evidentiary hearing in order that this Court may assess that evidence that Petitioner contends his counsel failed to explore.

Petitioner reasserts his contentions and draws his own conclusions from those assertions. Counsel did bring out the criminal background of LaDonna Avery, and Petitioner does not convince this Court that any other prior convictions would have affected the outcome. Petitioner's contentions regarding Officer Kenderesi not being called to testify are unavailing as counsel's trial strategy was

1 lack of evidence and Kenderesi's evidence related to the child victims's conflicting evidence on an
2 alleged violation of a no contact order against Petitioner. The claim of failing to call two witnesses
3 also fails because there is no showing that their testimony would have been other than repetitive.
4 The claim of failing to object to hearsay fails because counsel did so object, and Petitioner's
5 suggestion that the trial court indicated that counsel could object item-by-item even though a general
6 ruling was made does not support ineffective assistance for not so objecting. Petitioner asserts that
7 for sentencing pursuant to the specialized sexual offender sentencing alternative (SSOSA) a
8 defendant need only accept past deviancy not admit guilt of the crime of which he was accused. The
9 record indicates that Petitioner's counsel submitted an affidavit indicating that he discussed SSOSA
10 with his client, and counsel's advice that because Petitioner denied committing the crime, it was
11 unlikely he would receive a SSOSA does not demonstrate ineffective assistance of counsel.

12 The Court having reviewed the Report and Recommendation of the Hon. J. Kelley Arnold
13 United States Magistrate Judge, objections to the Report and Recommendation, and the remaining
14 record, does hereby find and Order:

- 15 (1) The Court adopts the Report and Recommendation;
- 16 (2) The petition is **DISMISSED WITH PREJUDICE** for the reasons set forth in the
17 Report and Recommendation.
- 18 (3) Petitioner's Motion for an Evidentiary Hearing and Discovery [Dkt. # 25] is
19 DENIED;
- 20 (4) The clerk is directed to send copies of this Order to Petitioner, counsel for
Respondent, and to the Hon. J. Kelley Arnold.

21 DATED this 24th day of January 2006.

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24 FRANKLIN D. BURGESS
25 UNITED STATES DISTRICT JUDGE
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